

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

PERIODIC REPORTING
(PROPOSALS SIXTEEN THROUGH TWENTY)

Docket No. RM2012-2

RESPONSE OF THE UNITED STATES POSTAL SERVICE
TO MOTION OF GAMEFLY, INC. TO STRIKE PORTIONS
OF USPS PETITION FOR RULEMAKING
(December 13, 2011)

On December 7, 2011, GameFly, Inc. (“GameFly”) moved to strike from the Postal Service’s Petition a sentence that references GameFly and the sentence’s accompanying footnote, which also references GameFly.¹ GameFly asserts that, by including the statements in the Petition, the Postal Service violated 39 U.S.C. § 410(c)(2) and 412(a).

Section 410(c)(2) grants the Postal Service the discretion to withhold from public disclosure certain information of a commercial nature. Importantly, the provision does not require that the Postal Service withhold such information. Thus, even if the statements that GameFly objects to contained information covered by section 410(c)(2) – they do not contain such information – the disclosure of such information would not violate section 410(c)(2).

Section 412(a) precludes the Postal Service from making available to the public “any mailing or other list of names or addresses (past or present) of postal patrons or other persons.” The statements that GameFly objects to refer to its current status as a

¹ Motion of GameFly, Inc., to Strike Portions of USPS Petition for Rulemaking, Docket No. RM2012-2 (Dec. 7, 2011).

mailer and to the Docket No. C2009-1 litigation conducted at the Commission to resolve a complaint brought by GameFly against the Postal Service, pursuant to 39 U.S.C. § 3662. Through that litigation, GameFly's name and status as a postal patron were publicly discussed for years. GameFly's identity as a mailer, its mode of mailing, and its mailing practices were, in fact, the subjects of extensive public testimony and numerous pleadings, many of which were filed by GameFly itself. In light of the very public nature of these matters, the statements presently objected to by GameFly clearly fall well outside of both the plain meaning and the spirit of the prohibitions embodied in section 412.

The Postal Service disagrees with, and objects to, the substantive allegations, the tone, the implications, and the legal conclusions contained in GameFly's unusual attempt to censor statements made in an independent rulemaking proceeding. Nevertheless, it appears that GameFly's Motion to Strike may be delaying the Commission's consideration of the proposals presented in Docket No. RM2012-2.² Therefore, to facilitate the Commission's review of the proposals, the Postal Service is today filing an alternate version of the Petition that excludes the statements objected to by GameFly.

² As of the time of the filing of the present pleading, the Commission has not yet issued a Notice regarding the Petition.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

Daniel J. Foucheaux, Jr.
Chief Counsel, Pricing & Product Support

Nabeel R. Cheema

475 L'Enfant Plaza, S.W.
Washington, D.C. 20260-1137
(202) 268-7178; Fax -5402
December 13, 2011